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NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

V.

JOYCE GLASS McCRARY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

OF
CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
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Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Does a party to whom a statute forbidding possession of counterfeit drugs obviously applies have standing to raise the statute's alleged unconstitutional vagueness as to other persons?

2. Where a statute has been judicially construed to require scienter, does the fact that the statute's language makes no express reference to scienter render the statute unconstitutionally vague?

3. Is a statute which has been judicially construed as requiring scienter, rendered unconstitutionally vague by the fact that it does not require a specific intent?

4. Is a clear and concise statute rendered unconstitutionally vague by the fact that it relates to a subject which a certain court considers socially harmless?

THE PARTIES

In the Circuit Court of Jackson County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Joyce McCrary, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Jackson County, Alabama and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama reversing Respondent McCrary's conviction is not as yet reported but will be reported as follows:

McCrary v. State, ____ So. 2d ____ (Cr. App. Ala., 1982)

A copy of the same is submitted in Appendix "A" to this petition.

The orders of the Supreme Court of Alabama granting and then quashing the writ of certiorari in this case are not as yet reported but will be reported as follows:

Ex parte: State; In re: McCrary v. State, ____ So. 2d ____ (S. Ct. Ala., 1983)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama quashing the writ in this case was issued on April 8, 1983, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Criminal Appeals of Alabama found the statute under which Respondent McCrary was convicted to be repugnant to the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws..."

STATUTORY PROVISIONS INVOLVED

At issue in this case is the constitutionality of Title 20, Section 20-2-70, Code of Alabama, 1975, as regards the possession of counterfeit drugs. A copy of this statute is submitted as Appendix "C" to this petition. The particular portion of this statute which the Alabama Courts found unconstitutionally vague reads as follows:

"...(b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more

that 15 years and may be fined not more than $25,000.00" (Title 20, Section 20-2-70, Code of Alabama, 1975; Appendix "C")

STATEMENT OF THE CASE

Following her conviction for possessing, selling, furnishing or giving away counterfeit controlled substances,[1] Respondent McCrary appealed to the Court of Criminal Appeals of Alabama. (R. pp. 70-71; 89 and 90)

On August 24, 1982, the Honorable Court of Criminal Appeals of Alabama reversed Respondent McCrary's conviction on the grounds that the statute under which she was convicted is allegedly unconstitutionally vague. As to Respondent McCrary's standing to raise vagueness in light of the statute's obvious

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[1]Title 20, Section 20-2-70(b), Code of Alabama, 1975; Appendix "C".

application to her, the Court followed several old Alabama Supreme Court opinions[2] allowing any defendant to raise a claim of vagueness without regard to the facts of his or her own case. The Court's finding of vagueness was based not on the statute's language but on considerations involving social harm, scienter and specific intent. McCrary v. State, ____ So. 2d ____ [Cr. App. Ala., 1982]; Appendix "A").

The State's application for rehearing raising substantially the same points raised here was overruled on October 12, 1982. (Appendix "A", p. 27)

The State petitioned the Supreme Court of Alabama for a writ of certiorari raising these same points and expressly asking the Alabama Supreme Court to

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[2]Kahally v. State, 254 Ala. 482, 48 So. 2d 794 (1950); Esco v. State, 278 Ala. 641, 179 So. 2d 766 (1965)

overrule its earlier opinions on standing to raise vagueness, so as to bring the law of Alabama into conformity with the teachings of this Honorable Court.[3]

On January 4, 1983, the Alabama Supreme Court found probable merit in the

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[3]Ground 8 of the State's petition in the Alabama Supreme Court read as follows:

> "...8. The Honorable Court of Criminal Appeals reached its decision in reliance on this Honorable Court's decisions and opinions in Kahally v. State, (254 Ala. 482, 48 So. 2d 794 [1950]) and Esco v. State, (278 Ala. 641, 179 So. 2d 766 [1965]), and the State is seeking to have these cases overruled to the extent that they authorize persons to whom a statute clearly applies to raise questions of vagueness as to the statute's application to others...."

In its supportive brief the State argued that Kahally and Esco were contrary to the decisions and opinions of the United States Supreme Court.

petition and granted the writ. Respondent McCrary declined to file a brief, and the case was submitted on January 31, 1983. However on April 8, 1983, the Alabama Supreme Court quashed the writ "...as improvidently granted...." without opinion. (Ex parte: State; In re: McCrary v. State, ____ So. 2d ____ [S. Ct. Ala., 1983]; Appendix "B")

STATEMENT OF THE FACTS

The Petition is based on the following facts, as found by the Court of Criminal Appeals of Alabama:

> "The State's evidence proved that two Scottsboro police officers, armed with a search warrant, went to appellant's [i.e. Respondent McCrary's] residence, showed her the warrant, and told her they were authorized to search

for Quaaludes or methaqualone. Upon reading the warrant, appellant replied, 'All that's here are those old fake pills,' and 'That's those old pills I have in the back room,' or words to that effect. The appellant then brought out a bottle containing 415 white pills stamped "LEMMON 714" and scored on the back.

"One of the officers familiar with the appearance of Quaaludes testified that the pills looked exactly like those containing the controlled substance to him. A preliminary analysis of the pills at Scottsboro police headquarters, however,

indicated they did not contain the controlled substance methaqualone. The toxicologist's analysis, and later testimony, confirmed the finding that the capsules did not contain methaqualone or any other controlled substances, but compounds resembling aspirin and antihistamine.

"An official of the Lemmon Corporation testified that his company manfactured a drug containing methaqulaone, under the trade name 'Quaalude.' The pill is stamped 'LEMMON 714' and scored on the reverse side. He testified that the pills found at appellant's residence were not manufactured by his company although they were 'a

very good imitation.' He also stated that Lemmon had not authorized anyone to make a facsimile Quaalude...."

(McCrary v. State, ____ So. 2d ____ [Cr. App. Ala., 1982]; Appendix "A", pp. 1-3)

SUMMARY OF THE ARGUMENT

The statute is clear and unambiguous on its face. The Alabama Courts ruled the statute vague on the basis of matters which are irrelevant to vagueness. Respondent McCrary was allowed to raise vagueness even though the statute obviously applied to her. In all of this the Alabama Courts ruled contrary to the policies, decisions and opinions of this Honorable Court.

I. This Honorable Court has a well established policy that: Except in the

area of expression a statute will not be struck down for vagueness on the basis of "...hypothetical cases which may never arise...." Robinson v. United States, 324 U.S. 282, 286, 89 L. Ed. 944, 947, 65 S. Ct. 666 (1945) The Alabama Courts have nearly the opposite policy: Except in one area, which happens to involve expression, statutes will be tested for vagueness against any conceivable hypothetical case.

The writ should issue to resolve this conflict.

II. In declaring this statute unconstitutionally vague, the State Courts ruled contrary to all of those decisions of this Honorable Court on what constitutes vagueness in a statute. In relating vagueness to "social harm" as measured by a given court, the Alabama

Courts established a rule which defeats "...the most important aspect of the vagueness doctrine...." Kolender v. Lawson, ____ U.S. ____, ____ L. Ed. 2d ____, ____ S. Ct. ____, 51 U.S. L. Wk. 4532, 4534 (1983) The Alabama Courts also ruled contrary to the decisions of this Honorable Court on:

1. The right of the legislative branch to determine social harm.

2. The need to consider judicial construction in reviewing a statute for alleged vagueness.

3. The relationship of scienter and specific intent to vagueness.

ARGUMENT

Title 20, Section 20-2-70, Code of Alabama, 1975, (Appendix "C") provides in pertinent part:

> "...(a) Except as authorized by this chapter, any person who possesses, sells, furnishes, gives away, obtains or attempts to obtain by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or written order or by the concealment of material fact or by use of false name or giving a false address controlled substances enumerated in schedules I, II, III, IV and V is guilty of a felony...." (Appendix "C")

The expressions "possesses", "sells", "furnishes", "gives away", etc. are not terms of art, but are common expressions which are used in their common meanings. These expressions are precise. Although the statute does not use the word "knowingly" or other words referring to scienter, the Alabama Supreme Court has construed the statute as requiring knowledge. Walker v. State, 356 So. 2d 672 (S. Ct. Ala., 1977) Thus, the statute as construed reads: "...any

person who [knowingly] possesses, sells, etc...." No one could read this statute and fail to know exactly what conduct the statute is outlawing.

Respondent McCrary was not convicted under subsection "a" of this statute but under subsection "b", which reads, in pertinent part:

> "...(b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony...." (Appendix "C")

Thus all of the requirements of subsection "a" above, <u>including scienter</u>, are incorporated by reference into subsection "b". "Counterfeit substance" would appear to be a self-defining expression but is, nonetheless, defined as follows:

> "...(6) COUNTERFEIT SUBSTANCE. Substances which, or the container or labeling of which, without authorization, bears

> the trademark, trade name or other identifying mark, imprint, number or device or any likeness thereof of a manufacturer, distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the substance. (Title 20, Section 20-2-2, Code of Alabama, 1975; Appendix "C")

The Alabama Court of Criminal Appeals held that this statute was unconstitutionally vague as applied to possession of counterfeit substances, because the statute as drafted does not expressly require scienter, because the statute does not require specific intent, and because possession of counterfeit controlled substances is allegedly not socially harmful. The Court allowed Respondent McCrary to raise vagueness even though, under the unconflicting evidence, the statute clearly applied to her. In so ruling the Alabama Courts ruled contrary to numerous decisions of this Honorable Court.

I.

ON STANDING

REASON FOR GRANTING THE WRIT: CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT.

A law is essentially an idea but to have any practical effect that idea must be communicated by the means of words. Ideas are abstract, while words are material and concrete. No matter how carefully language is framed, it never precisely covers the idea. This is the key problem in statutory drafting: How to express the legislature's intent, covering the subjects of legislative concern, without extending beyond the limits of those concerns. At the same time, a statute must be worded with sufficient prescision to inform individuals and the Courts of what is required or forbidden. If each statute had to meet all of these requirements

perfectly on its face, legislation would be a practical impossibility. However, statutes need not meet each of these requirements on their face. If a statute clearly defines the forbidden or mandated conduct, many questions about the statute's applicability to unusual or unanticipated situations can be left to the commonsense and good will of the executive and judicial branches of the government. It is in this context that this Honorable Court has established the principle that, except in the area of expression, the alleged vagueness of a statute will not be tested in the abstract but only as applicable to a particular case. Robinson v. United States,[4] 324 U.S. 282, 89 L. Ed. 2d 944,

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[4]"...It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all. We (con't)

65 S. Ct. 666 (1945); United States v. National Dairy Products Corp.[5], 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963)

Now, Alabama has for many years tested statutes for vagueness against "...hypothetical cases which may never

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footnote 4 con't

do not know what provision of law, Constitutional or statutory, gives us power wholly to nullify the clearly expressed purpose of Congress to authorize the death penalty because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise...." (324 U.S. 282, 286, 89 L. Ed. 944, 947)

[5]"...Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harriss, 347 U.S. 612, 617, 98 L. ed. 989, 996, 74 S. Ct. 808 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged...." (372 U.S. 29, 32-33, 9 L. Ed. 561, 565-566)

arise...." Robinson, above. In Kahalley v. State, (254 Ala. 482, 48 So. 2d 794 [1950]), the Alabama Supreme Court condemned as vague and "...repugnant to the Fourteenth Amendment [to] the U.S. Constitution...." (485 So. 2d 794, 796), a statute outlawing "unlawful peeping." The court observed that, "...undoubtedly, ...[the statute]...was intended to serve a useful purpose and bring to justice so-called 'Peeping Toms'...." (485 So. 2d 794, 795), but then the Court went to great lengths to list numerous "innocent situations" which were possibly covered by the statute's language. The Court never states what Kahalley himself did, and it did not seem to matter, since there were so many "innocent" hypothetical cases to which the statute could have applied. On a similar analysis a statute outlawing changing

one's name to conceal identity was struck down in Esco v. State, (278 Ala. 641, 179 So. 2d 766 [1965]). Again, the Court struck down the statute with a lengthy examination of hypothetical applications of the statute but no hint as to Esco's own conduct. The Alabama Supreme Court ruled that the statute was "...unconstitutional as to deny the requirements of due process under the doctrine of Kahalley...." Esco, 179 So. 2d 766, 771.[6] These cases are in patent conflict with this Honorable Court's policy on standing to raise the alleged vagueness of a statute, but the conflict does not stop there.

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[6]All of the Alabama cases in this area demonstrate a confusion of vagueness and overbreadth.

In 1979 the Court of Civil Appeals of Alabama struck down as unconstitutionally vague a liquor regulation, which disallowed "...topless or bottomless dancers or performers...." Blood Brothers Inc. v. Alabama Alcoholic Beverage Control Board, 386 So. 2d 218 (Civ. App. Ala. 1979) However, the Alabama Supreme Court reversed holding that, since the regulation clearly barred the activity at the lounge in question, Blood Brothers had no standing to raise the vagueness issue. Blood Brothers Inc. v. Alabama Alcoholic Beverage Control Board, 386 So. 2d 220 (S. Ct. Ala., 1980) Although neither Court mentioned Kahalley or Esco, there was a strong suggestion that those cases had been superceded. Such a suggestion can not survive the instant case. Here the Court of Criminal Appeals of Alabama relied on Kahalley and

Esco to give Respondent McCrary standing to raise the question of the alleged vagueness of this statute. The fact the Alabama Supreme Court first granted review and then quashed the writ, demonstrates that Kahalley and Esco are still the law except in the area of nude cabaret performances. Such performances, of course, involve expression.[7] Therefore, the Alabama rule on standing to raise questions of the alleged vagueness of a statute is:

> "Except in a certain area which involves expression, the alleged vagueness of a statute as to any hypothetical

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[7]"...While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression...." California v. LaRue, 409 U.S. 109, 119, 34 L. Ed. 2d 342, 352, 93 S. Ct. 390 (1972)

application may be raised by anyone."

This is nearly the opposite of the rule long followed by this Honorable Court.

In the instant case Respondent McCrary was in possession of 415 pills which were stamped "Lemmon 714." A police officer familiar with the quaaludes manufactured by the Lemmon Company testified that they looked exactly like the genuine article. An official of the company testified that the pills were "a very good imitation." These pills were perfect examples of counterfeit substances as defined by the statute. Title 20, Section 20-2-2(6), Code of Alabama, 1975; Appendix "C". At the time she was served with the search warrant Respondent McCrary made an unsolicited volunteered statement acknowledging her possession of "fake

pills." Obviously, the statute applied to Respondent McCrary. Yet the State Court of Appeals following Kahalley and Esco allowed her to raise a claim of vagueness.

The long standing policy of this Honorable Court is against examining allegations of vagueness against "...hypothetical cases which may never arise...." See footnote 4, page 18. In Young v. American Mini Theatres (427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 [1976]) this Honorable Court rejected a vagueness claim with these words:

> "...[E]ven if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents...To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected...." (427 U.S. 50, 58-59, 49 L.Ed.2d 310, 319)

See also Hoffman Estates v. Flipside, ____ U.S. ____, 71 L. Ed. 2d 362, 102 S. Ct. (1982) This policy is consistent with this Court's broader policy on standing to raise constitutional questions. This policy was restated only last year in New York v. Ferber, (___ U.S. ___, 73 L.Ed.2d 1113, 102 S.C. ___ [1982]. There your Honors wrote:

> " . . . The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. . ." (73 L.Ed.2d 1113, 1129).

Since the long standing rule followed in Alabama on standing to raise vagueness under the Fourteenth Amendment is in complete conflict with the rule of this Honorable Court, the writ should issue so that the United States

Constitution will be properly applied in Alabama.

II.

THE STATE COURTS MISAPPLIED THE U.S. CONSTITUTIONAL STANDARDS FOR MEASURING VAGUENESS IN STATUTES

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING DECISIONS OF THE SUPREME COURT

That the mischief of the Alabama rule on vagueness goes beyond standing to matters of substance is clearly demonstrated by this case. The Alabama Court of Criminal Appeals correctly stated the vaguenss doctrine of this Honorable Court:

> "The doctrine of vagueness... originates in the due process clause of the Fourteenth Amendment, see Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), and is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful, see United States v. National Dairy

Products Corporation, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963)

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989, 996 (1954). A vague statute does not give adequate notice of the required conduct to one who would avoid its penalties, Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367, 371 (1951), is not sufficiently focused to forewarn of both its reach and coverage, United States v. National Dairy Products Corporation, 372 U.S. at 33, 83 S.Ct. at 598, 9 L.Ed.2d at 566, and may trap the innocent by not providing fair warning, Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227-28 (1972).

"As the United States Supreme Court observed in Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948):

> 'There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt.'
>
> 333 U.S. at 515-16, 68 S.Ct. at 670, 92 L.Ed.2d at 849-50 (citations omitted).... "(McCrary v. State, ____ So. 2d ____ [Cr. App. Ala., 1982] Appendix A, pp. 9-11)

Had the Court of Appeals followed these principles, the State of Alabama would not be burdening this Honorable Court with this petition. Manifestly Title 20, Section 20-2-70(b), Code of Alabama, 1975, contains clear notice of what is forbidden and a clear standard of guilt. However, the Court of Criminal Appeals did not apply the principles of this Honorable Court but shifted from Winters v. New York, with its concern for

"ascertainable standards of guilt" to Kahalley v. State, (254 Ala. 482, 48 So. 2d 794 [1950]) and Esco v. State, (278 Ala. 641, 179 So. 2d 766 [1965]), with their long listings of "hypothetical cases which may never arise." Although the Court of Criminal Appeals could not think of any innocent uses for counterfeit controlled substances (who could?), it applied these cases thusly:

> Similarly, § 20-2-70(b) "marks no line between lawfulness and criminality," Kahalley v. State, supra. It proscribes the possession of a substance which, by its nature, is essentially harmless.[8] A "counterfeit substance" becomes injurious to the public health, safety or welfare only with the addition of a specific intent

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[8]Although the social harm of counterfeit drugs would appear to be obvious, the State of Alabama filed in the Alabama Supreme Court an appendix to its brief reproducing eight learned articles, totaling some 34 pages, on the social harm of counterfeit drugs.

> on the part of its possessor to pass it off or to represent it as genuine.... (Appendix "A", p. 14)

Thus, in the Court of Criminal Appeal's view, vagueness becomes a function of social harm. And, since social harm is largely a matter of opinion,[9] vagueness no longer relates to notice nor the standard of guilt but addresses itself to the social values of a given court. This is an interesting development, since one of the reasons[10] for the policy against vagueness in statutes is that:

> "...A vague law impermissibly delegates basic policy matters to policemen, Judges, and Juries for resolution on an ad hoc and subjective basis, with

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[9]Of course, many people consider genuine controlled substances to be socially harmless.

[10]In fact this reason now appears to be "...the more important aspect of the vagueness doctrine...." Kolender v. Lawson, ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 51 U.S. L. Wk. 4532, 4534 (1983)

> the attendant dangers of arbitrary and discriminatory applications...." (Hoffman Estates v. Flipside, ____ U.S. ____, 71 L.Ed.2d 362, 371, 102 S.Ct. ____ [1982]; quoting from Grayned v. Rockford, 408 U.S. 104, 108, 33 L.Ed.2d 222, 227-228, 92 S. Ct. 2294 [1972]) (Emphasis supplied)

Thus, the Alabama Courts have come up with a rule which not only does not follow the policy of this Honorable Court but which actually produces the result that this Court's policy is designed to prevent. Social harm addresses itself to legislative not judicial discretion. Day-bright Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 96 L.Ed. 469, 472, 72 S.Ct. 511 (1954); New Orleans v. Dukes, 427 U.S. 297, 302, 49 L.Ed.2d 511, 517, 96 S.Ct. 2513 (1976); Young v. American Mini Theaters, Inc., 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976); Penn Central Transportation Co. v. New York, 438 U.S. 104, 57 L.Ed. 2d 631, 98 S.Ct.

2646 (1978). This is also the law of Alabama. Mobile v. Yuille, 3 Ala. 137 (1841); McCraney v. Leeds, 241 Ala. 198, 1 So. 2d 894 (1941); Tyson v. Johns-Manville Corp., 399 So. 2d 263, 271 (S. Ct. Ala., 1981).

The Alabama Courts also misapplied this Honorable Court's teachings on scienter requirements as they relate to vagueness.

First, the Court of Criminal Appeals recognized that the statute had been judicially construed as requiring scienter.[11] Then the Court concluded

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11"...In Walker v. State, [356 So.2d 672 (S.Ct. Ala., 1977)], supra, the Alabama Supreme Court recognized the State's authority under the police power 'to impose strict liability in connection with a variety of regulatory statutes for what are commonly called "public welfare offenses,"' 356 So. 2d at 673, but it held that the Alabama Controlled Substances Act was no one of those statutes...." (Appendix "A", pp. 15-16)

that the fact that the statute did not expressly require scienter rendered the statute unconstitutionally vague.[12] This is in irreconcilable conflict with the Constitutional policy set by this Honorable Court of testing statutes for vagueness in light of authoritative judicial construction. This policy is seen most recently in Kolender v. Lawson, (____ U.S. ____, ____ L.Ed.2d____, ____ S. Ct. ____, 51 U.S. L. Wk. 4532, 4533 [1983]), where a challenged California statute was tested in light of State Court interpretation.

The Alabama Court of Criminal Appeals then confuses scienter and specific intent and concludes that both

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12"...Because the Alabama statute sets out no scienter requirement, it fails to give fair warning to someone in appellant's position of the type of conduct which will be considered criminal...." (Appendix "A", p. 19)

are necessary to avoid vagueness under the Federal Constitution.[13] This Honorable Court has often upheld statutes which contain somewhat vague expressions, such as "unreasonable" or "marketed for use", on the grounds that the statute required that the action be willfull, intentional or knowing. E.g. Boyce Motor Lines v. United States, 342 U.S. 337, 96 L.Ed. 367, 72 S.Ct. 329 (1951); Hoffman Estates v. Flipside, ____ U.S. ____, 71 L.Ed.2d 362, 102 S.Ct. ____ (1982). However, this Honorable court has never suggested that a statute which on its

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13"...We note that the recent holding of the United States Supreme Court in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., [____ U.S. ____, 71 L.Ed.2d 362, 102 S. Ct. ____ (1982)], supra, though not based on a criminal statute, supports our conclusion that specific intent is a necessary ingredient for fair warning in a criminal provision...." (Appendix "A", pp. 20-21)

face clearly gives notice of the outlawed conduct, precisely sets the standard of guilt and has been authoritatively construed as requiring scienter is vague because it does not also require specific intent.

It is apparent that the decision and opinion of the Court of Criminal Appeals of Alabama and the earlier Alabama cases on which it is based are in patent conflict with the decisions and policies of this Honorable court and for this reason the writ should issue so that the law of Alabama can be brought into conformity with the Constitution of the United States.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Honorable Court of Criminal Appeals and Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court on numerous different points of U.S. Constitutional law. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinion of the Honorable Courts of Alabama and on such review will reverse the decisions of said Courts holding Title 20, Section

20-2-70(b), Code of Alabama, 1975 (Appendix "C") unconstitutionally vague and reversing the conviction of Respondent McCrary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of June, 1983, I did serve the requisite number of copies of the foregoing on the Attorneys for Joyce Glass McCrary, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

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